

MEMORANDUM

DATE: February 13, 2007

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Ms. Daniese McMullin-Powell
Chairperson
State Council for Persons with Disabilities

RE: H.B. 3 [Restroom Access]

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 3 which would require any retail establishment that has a toilet facility for its employees to allow a customer to use that facility during normal business hours if the following conditions are met: 1) the customer has an eligible medical condition or uses an ostomy device; 2) there are at least 10 employees working at the time of the request; 3) the retailer does not normally make its restroom available to the public; 4) the toilet facility is not located in an area where providing access would create an obvious health or safety risk; and 5) there is no public restroom immediately accessible to the customer. SCPD reviewed the predecessor bill (H.B. 329) in March 2006 and endorses the concept of H.B. 3. However, Council believes the proposed legislation could be improved consistent with the following observations.

First, the sponsors may wish to consider amending the definition of "retail establishment". At a minimum, the sponsors may wish to insert "or lease" after "sale" to cover establishments which lease vehicles, furniture, etc. Alternatively, the sponsors could consider some variation of the "place of public accommodation" definition in Title 6 Del.C. §4502(11), i.e., "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public."

Second, the bill is unclear on what proof, if any, a retailer may request that a customer has a qualifying condition. The "any other medical condition that requires immediate access to a toilet facility" standard is fairly broad. The lack of standards may foster unnecessary confrontations and disagreements. Cf. Thompson v. Dover Downs, Inc., No. 40, 2005 (Del. November 3, 2005) [reasonable inquiry permitted on status of "service dog"]. Moreover, the ADA may limit the scope of the retailer's inquiry about the person's disability. *Id.* at fn. 11. The sponsors could consider adding the following sentence to § 8902(2): "Any benefit of the doubt concerning the existence of an eligible medical condition shall be accorded to a customer who reasonably communicates his

qualification."

Third, ADA regulations require places of public accommodation to modify practices when necessary to accommodate individuals with disabilities. See 28 C.F.R. §36.302(a). Under some circumstances, the ADA may already contemplate retailers waiving an employee-only restroom policy as an accommodation to a qualified individual with a disability. Moreover, municipalities could have ordinances granting greater rights. It would therefore be appropriate to insert the following new §8906:

§8906. Effect on other laws.

Nothing in this chapter shall be construed to invalidate or limit any state, local, or other law providing persons with disabilities greater access to restrooms than required by this chapter.

Fourth, the procedure for assessing a civil penalty is unclear. Query who is authorized to impose the penalty and what due process applies? Compare, e.g., Title 16 Del.C. §§1109 and 7406B.

Fifth, SCPD prefers that the bill cover retail establishments with fewer than 10 or more employees consistent with the predecessor bill (H.B. 329) which covered stores with 3 or more employees. Council believes this provision would truly cover the size of retail establishments in which persons with disabilities would need such an accommodation.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations or recommendations on the proposed legislation.

cc: The Honorable Ruth Ann Minner
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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